IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

No. 10 – **COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING**.

[Chapter VIII, Rule 32 (2) (b)]

**Writ Petition No. 3904 (S/S/) /2001.**

Old No. 13896/1993

Raj Kumar Gurung S/o Shri Prem Bahadur Gurung,
R/o Village- Naya Gaon, P.O.- Garhi Cantt.,
District- Dehradun

..... Petitioner.

Vs.

1. Chief of Army Staff, Army Headquarters, New Delhi.
2. Commanding Officer, 3rd Btn., Parachute Regiment, C/o 56 A.P.O.
3. Commandant, G.O.C.-in- C, Central Command, Lucknow.

..... Respondents.

Decided on 27.11.2007

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting.~~

**(P.C. Verma, J.)**

COURT NO. 2

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**Writ Petition No. 3904 (S/S) /2001**
(Old No. 13896/1993)

Raj Kumar Gurung,
S/o Sri Prem Bahadur Gurung,
R/o Village Naya Gaon,
P.O. – Garhi Cantt.,
District Dehradun. …… Petitioner

**Versus**

1. Chief of Army Staff,
   Army Headquarters,
   New Delhi.
2. Commanding Officer,
   3rd Btn., Parachute Regiment,
   C/o 56 A.P.O.
3. Commandant,
   G.O.C-in-C, Central Command,
   Lucknow.

…. Respondents.

Sri Paresh Tripathi, learned Counsel for the petitioner.
Ms. Anjali Bhargave, learned Standing Counsel for the Union of India.

**27th November, 2007**

**Hon'ble P.C. Verma, J.**

By means of this writ petition, the petitioner has sought a writ of Certiorari to quash the orders dated 18.01.1992 and 25.07.1992.

2. The petitioner was a Sepoy in the Indian Army, who absented himself from duty without leave for which summary Court Martial was conducted under section 39-A. Thereafter Court Martial was also conducted though wrongly referred in the order as summary court-marital as is evident from the counter-affidavit. The

petitioner was awarded the punishment of 6 months' rigorous imprisonment in Civil Jail, reduction in rank and dismissal from service. The appeal of the petitioner was rejected by the appellate authority.

3. Learned counsel for the petitioner attacked the procedural part of holding of the court-marital proceeding as well as the punishment order on the basis of section 39, 71, 72, 73, 116 and 130 of the Army Act, 1950. Learned Counsel for the petitioner submitted that procedure of court- martial prescribed under section 130 of the Army Act was not followed. It was submitted that that summary court-marital did not take place and that the petitioner was not given copies of proceedings.
Section 130 (1) is reproduced as under:

> "130. Challenges.-(1) At all trials by general, district or summary general court- martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court."

4. But on perusal, it reveals from the record that summary court-martial was conducted as per the procedure laid down under the Army Act and the petitioner was duly informed about the 'friend of accused' and the officers and JCO attending the trial through the battalion routine order, part I dated 13.1.1992. Petitioner was also given copies of summary of evidence and the tentative chargesheet on 14th January, 1992 and the petitioner has also acknowledged the receipt of the same. Admittedly, after the trial, the petitioner was not provided

with the copy of the summary court-martial as the petitioner did not apply for the same. An accused in the case of summary court-martial is entitled to get the copy of the proceedings only when he makes a request to this effect to the officer or to the court. It is not the case of the petitioner that he had applied for the copy of the proceedings and was not supplied the same. As such, argument of the learned Counsel for the petitioner has no substance and is rejected accordingly.

5. Challenging the punishment order, learned Counsel for the petitioner submitted that section 39 does not prescribe punishment of dismissal. General punishments have been prescribed under section 71 and can be awarded under section 72 which should be lower in scale as set out in section 71. Section 73 further provides that a sentence of a court-martial may award in addition to, or without any one other punishment, the punishment specified in clause (d) or clause (e) of section 71 and any one or more of the punishments specified in clauses (f) to (l) of that section.

6. He challenges the punishment part as the charge against the petitioner was absence from duty without leave and was covered under Section 39. It is relevant to quote sections 39, 71, 72 and 73, which are reproduced hereunder in order of numbers:

> "39. Absence without leave.- Any person Subject to this Act who commits any of the following offences, that is to say,--
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> (a) absents himself without leave; or
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> (b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any crops, or portion of a crops, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or

(e) when on parade, or on the line or march, without sufficient cause or without leave from his superior officer, quits the parade or line or march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there,

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.

71. Punishment awardable by courts-martial. –Punishments may be inflicted in respect of offences committed by persons

subject to this Act and convicted by courts-martial, according to the scale following, that is to say.—

(a) death;

(b) transportation for life or for any period not less than seven years;

(c) imprisonment either rigorous or simple, for any period not exceeding fourteen years;

(d) cashiering in the case of officers;

(e) dismissal from the service;

(f) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to the ranks or to a lower rank or grade, in the case of non-commissioned officers;

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy;

(g) forfeiture of seniority of rank, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers; and forfeiture of all or any part of their service for the purpose of promotion depends upon length of service;

(h) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(i) severe reprimand or reprimand, in the case of officers, junior commissioned

officers, warrant officers and non-commissioned officers.

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;

(k) forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good.

72. Alternative punishments awardable by court- martial. – Subject to the provisions of this Act, a court-martial may, on convicting a person subject to this Act of any of the offences specified in sections 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable, or, in lieu thereof, any one of the punishments lower in the scale set out in section 71, regard being had to the nature and degree of the offence.

73. Combination of punishments.- A sentence of a court-martial may award in addition to, or without any other punishment, the punishment specified in clause (d) or clause (e)

of section 71 and any one or more of the punishments specified in clauses (f) to (l) of that sections"

7. Section 39 provides punishment for absence without leave to suffer imprisonment for a terms which may extend to three years or such less punishment as is in this Act mentioned. Section 71 provides general punishments by court-martial and section 72 provides alternative punishments awardable by the court-martial. Since section 39 is in between section 34 and section 68, as referred in section 72, section 72 is to be examined which provides that a court-martial may award either the particular punishment with which the offence is stated to be punishable, **or in lieu thereof, any one of the punishment lower in the scale set out in section 71,** regard being had to the nature and degree of the offence. Perusal of section 71 clearly shows that imprisonment either rigorous or simple is provided under clause (c) of section 71 or lower to that, of cashiering, in the case of officers as provided under clause (d) and lower to that, of dismissal from the service as provided under clause (e). Thus, a combined reading of sections 39, 71, and 72 makes it clear that only one punishment can be given, either it could be rigorous or simple imprisonment or dismissal from the service.

8. Now comes section 73, which provides that a sentence of a court-martial may award in addition to, or without any one other punishment, the punishment specified in clause (d) or clause (e) of section 71. This section clearly provides that two punishments can be awarded, one specified in the section and another in

addition to the punishment specified in clause (d) or clause (e) of section 71. In the present case, the punishment of imprisonment has been awarded under section 39 and punishment of dismissal has been awarded under section 73. Thus, the argument of the learned Counsel for the petitioner is misconceived.

9. Learned Counsel for the petitioner Sri Paresh Tripathi vehemently argued that section 72 is relatable to section 39 as both the sections deal with the conviction while sections 71 and 73 deal with punishments only and do not deal with conviction which results into imprisonment and for invoking section 72, degree and nature of office has to be taken into account. Section 39 itself provides for conviction and punishment. Section 72 is subject to the other provisions of the Act. Therefore, application of section 72 is subject to the provisions of section 71 and 73, which sections are not subject to any other provisions of the Act.

10. Learned Counsel for the petitioner relied on the judgment of Single Judge passed by this Court on 12.6.2006 in Writ Petition No. 5262 (S/S) of 2001. It is settled law that judgment of a Single Judge is binding upon the co-ordinate Bench, but on the close scrutiny I find that the said judgment is *per incuriam* and has not taken note that section 72 is subject to provision of section 73. Therefore, a judgment *per incuriam* has not the binding effect on a co-ordinate Bench in view of the law laid down by the Apex Court in the case of **State of U.P.** v. **Synthetics and Chemicals Limited** reported in (1991) 4 SCC 139. Therefore, this argument of the learned counsel for the petitioner is also misconceived.

11. In view of the aforesaid discussions, the writ petition is found to be devoid of merit and is dismissed accordingly. No order as to costs.

**(P.C. Verma, J.)**

Prabodh